CHEEK HONG LEONG *a*

v.

KYM INDUSTRIES (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
NIK HASHIM J
[CIVIL APPEAL NO: R3-16-1-98]
28 JANUARY 1999

LABOUR LAW: *Industrial Court - Reference to High Court - How should Industrial Court exercise discretion to refer question of law - Both parties consent to refer question - Whether sufficient to justify reference - Whether Industrial Court must provide reasons for exercising discretion to refer - Industrial Relations Act 1967, s. 33A(1)* *c*

The claimant filed a complaint in the Industrial Court against the respondent for constructive dismissal. The learned chairman of the Industrial Court found for the claimant and awarded compensation but made an order for reduced compensation. Dissatisfied, the claimant filed another application pursuant to s. 33A(1) of the Industrial Relations Act 1967 ('the Act') requesting the Industrial Court to refer a question of law to the High Court as to whether the Industrial Court erred in law by ordering reduced compensation. Both parties agreed that the question ought to be referred and the Industrial Court, by a unanimous decision, referred the question to the High Court. *d* *e*

Held:

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[1] The four conditions mentioned in s. 33A(1) of the Act must be fulfilled before a question of law may be referred to the High Court. While the discretion to refer a question of law to the High Court rests with the Industrial Court, it nevertheless must exercise the discretion in accordance with the established principles of law. The question of law must have arose in the course of proceedings, argued upon and decided on by the Industrial Court. The question that was decided must be of sufficient importance and the determination of which must have affected the award and raised sufficient doubt to merit the reference to the High Court. *g*

[2] A question cannot become a question of law justifying reference to the High Court simply by agreement of parties or by unanimous decision of the panel members of the Industrial Court. In the present case, the Industrial Court had merely stated that by a unanimous decision, it agreed *h*

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to exercise its discretion to refer the question to the High Court. Without the benefit of its finding that the conditions have been fulfilled, it is gravely doubtful whether the Industrial Court had exercised its discretion correctly.

[Notice of reference set aside; matter remitted to Industrial Court for readjudication on merits.]

Case(s) referred to:

Kulim (Malaysia) Berhad, Johor v. Mohd Zain Haji Idris [1983] ILR Vol 1 174 ***(refd)***

Jurutera Konsultant (SEA) Sdn Bhd v. Ng Boon Hock [1991] 1 ILR 663 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Minister of Labour & Manpower & Anor [1983] 2 MLJ 54 ***(refd)***

National Union of Teachers in Independent Schools, West Malaysia v. Han Chiang High School, Penang [1989] 2 MLJ 114 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 33A(1)

For the claimant/appellant - LG Seah (S Ravindran with her); M/s Lobo & Assocs
For the company/respondent - M Puravalen; M/s Jaspal Quah & Aishah

Reported by Izzaty Izzuddin

JUDGMENT

Nik Hashim J:

Pursuant to s. 33A of the Industrial Relations Act 1967 (the Act), a question was referred to the High Court by the learned President of the Industrial Court in his award no. 218 of 1997 dated 16 May 1997 (the second award). The question which the Industrial Court referred as a question of law, is:

> Whether or not having held that the claimant is entitled to a remedy because of the principles of equity and good conscience, the Industrial Court erred in law in giving equitable relief in the form of an order for reduced compensation against the guilty company/employer.

The above referred question was agreed upon by counsel from both sides after they had filed to reach a settlement in the award No. 238 of 1994 (the first award). The first award concerned the dismissal of Cheek Hong Leong @ Cheek Hon Leong (the claimant) by KYM Industries (M) Sdn Bhd (the company). The claimant claimed that he had been constructively dismissed by the company and claimed reinstatement to his former position as the factory manager in the company. The learned chairman found that the claimant was

constructively dismissed without just cause or excuse and ordered compensation instead. Among other things, the learned chairman at p. 15 of the first award said:

> ... It does not seem to be in conformity with equity and good conscience to award the claimant with what would be a windfall considering that he obtained a better job in less than 2 weeks after leaving the company.
>
> In the circumstances the Court orders the Company to pay the Claimant compensation for constructively dismissing the Claimant the sum of ringgit thirty thousand (RM30.000.00) which the Court feels should be sufficient sum in the circumstances of the case ...

Dissatisfied with the decision, the claimant filed the application under s. 33A(1) of the Act. Hence the question was referred to the High Court.

Section 33A(1) states:

> Where the Court has made an award under s. 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law –
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> (a) which arose in the course of the proceedings;
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> (b) the determination of which by the court has affected the award;
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> (c) which, in the opinion of the court, is of sufficient importance to merit such reference; and
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> (d) the determination of which by the court raises, in the opinion of the court, sufficient doubt to merit such reference.

The section is self-explanatory in its provision. By its terms, it is imperative on the part of the Industrial Court to be first satisfied that the four conditions mentioned above are fulfilled before a question of law may be referred to the High Court. If they are not fulfilled, then the Industrial Court must dismiss the application. YA Eusoff Chin J (as he then was) in *National Union of Teachers in Independent Schools, West Malaysia v. Han Chiang High School, Penang* [1989] 2 MLJ 114 at p. 115 ruled:

> ... on the application of any party to the proceedings in which the award is made, the Industrial Court is not bound to refer any question of law to the High Court under s. 33A(1) of the Industrial Relations Act, unless the Industrial Court is satisfied that the question is one which fulfils all the conditions provided in that section. In exercising its power to refer or not to refer a question to the High Court, the Industrial Court will have to do so judiciously.

The care required to be exercised in guarding against the reference under s. 33A(1) being turned into an appeal may be seen in the observation of Harun J (as he then was) in *Kulim (Malaysia) Berhad, Johor v. Mohd Zain bin Haji Idris* [1983] ILR Vol 1 174, where he said:

> ... section 33A of the Act is not designed as a vehicle for appeal from the Industrial Court to the High Court.

See also *Jurutera Konsultant (SEA) Sdn Bhd v. Ng Boon Hock* [1991] 1 ILR 663 where the principle in *Kulim's* case was followed in a similar application under s. 33A of the Act.

This court is of the view that while it is true that the discretion to refer a question of law to the High Court rests with the Industrial Court, nevertheless the Industrial Court must exercise the discretion in accordance with the established principles of law. The law requires that the question to be referred must be a question of law which arose in the course of the proceedings in the first award. This means that the question of law was before the Industrial Court, argued upon and a decision made by the court. The question that was decided must be of sufficient importance, the determination of which has affected the award and raised sufficient doubt to merit the reference to the High Court. So, these are the requirements the Industrial Court must bear in mind when considering an application under the section.

In the instant case, the learned president of the Industrial Court, in granting the leave to refer the question to the High Court in the second award briefly said this:

> ... The learned counsel for the claimant after giving reasons submitted that all the four conditions set out in section 33A(1) had been met, and asked that the Court refer question 2 to the High Court.
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> Mr Balendran, learned counsel for the Company agreed that Question No. 2 be referred to the High Court.
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> The Court by a unanimous decision agreed to exercise its discretion to refer Question 2 to the High Court and makes an order accordingly.

The question 2 mentioned above is the referred question in this case.

Having regard to the decision in the second award, I am of the view that the Industrial Court's reference of the question of law to the High Court was made without any legal basis. The Industrial Court in this case had acted injudiciously in making the order. A question of law cannot be referred to the High Court by consent unless the Industrial Court is first convinced that all the four conditions under s. 33A(1) are fulfilled, and in order to show that, it is important that there must be a finding to that effect in the award. The

fulfilment of the conditions is the prerequisite of the reference. In this case, there is nothing whatsoever in the second award to indicate that all the four conditions under the section have been fulfilled. Without the benefit of its finding that the conditions have been fulfilled, it is gravely doubtful whether the Industrial Court had really exercised its discretion correctly in accordance with the law in making the order. A question cannot become a question of law simply by agreement of the parties or by "unanimous decision" of the panel members of the Industrial Court, and hence referable to the High Court. A question of law has to be established, and it can only be one provided all the four conditions under s. 33A(1) are met. In the present case, the Industrial Court had merely stated that by a unanimous decision, it agreed to exercise its discretion to refer the question to the High Court. This, in my view, is insufficient to justify the reference under the law. Unless and until the four conditions are fulfilled and clearly stated so in the award, the High Court has no jurisdiction to answer the question referred. Jurisdiction does not originate in the consent of the parties and cannot be established by such consent (per Abdoolcader FJ in *Mersing Omnibus Co Sdn Bhd v. Minister of Labour & Manpower & Anor* [1983] 2 MLJ 54 at 56). It is to be noted that s. 33A is not a vehicle for appeal from the Industrial Court to the High Court (see *Kulim, supra*).

In an application under s. 33A(1), it is the duty of the Industrial Court to scrutinise the first award with utmost care to satisfy itself that the question now sought to be referred was the issue at the hearing of the first award as a question of law and it was decided so by the court. If the court finds that the question was not the issue, then the parties cannot utilise the restricted provision of s. 33A, and the Industrial Court cannot refer the question to the High Court for its determination, even though the parties have agreed to the reference.

For these reasons, I have no alternative but to order that the notice of reference be set aside and further order that this matter be remitted back to the Industrial Court with the direction that the claimant's application under s. 33A be readjudicated on its merit soonest possible in accordance with what I have said above. No order as to costs.